RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 18 2017
OFFICE OF THE CLERK

No. 16-784

IN THE

Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

Petitioner,

v.

FTI CONSULTING, INC., as Trustee of the Centaur, LLC Litigation Trust,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF TRIBUNE COMPANY RETIREES AND NOTEHOLDERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JAY TEITELBAUM
TEITELBAUM LAW GROUP, LLC
1 Barker Avenue
White Plains, NY 10601
(914) 437-7670
jteitelbaum@tblawllp.com
Counsel for the Retirees

LAWRENCE S. ROBBINS
Counsel of Record
ROY T. ENGLERT, JR.
ARIEL N. LAVINBUK
DANIEL N. LERMAN
SHAI D. BRONSHTEIN
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
lrobbins@robbinsrussell.com
Counsel for the Noteholders

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. BY ITS TERMS, SECTION 546(e) DOES NOT APPLY WHERE A COVERED ENTITY SERVED ONLY AS A CONDUIT 5

A. Section 546(e) Applies Only Where The Debtor Or The Transferee From Which The Trustee Seeks To Recover Is A Covered Entity 5

B. Petitioner Misinterprets Section 546(e) And Would Vastly Expand The Exception's Narrow Exclusion From The Trustee's Avoidance Powers 10

II. THE LEGISLATIVE HISTORY CONFIRMS THAT SECTION 546(e) DOES NOT PROTECT TRANSFERS CONDUCTED THROUGH FINANCIAL INSTITUTIONS 18

A. Congress Enacted The Exception To Protect Against The Risk That The Bankruptcy Of One Commodities Or Securities Firm Could Spread To Other Firms 19

TABLE OF CONTENTS—Continued

Page

B. The Problem Section 546(e) Addresses Is Not Implicated Where Neither The Debtor Nor The Transferee From Which The Trustee Seeks To Recover Is A Covered Entity 24

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

Cases

Bank of Am. Nat'l Tr. & Sav. Ass'n v. *203 N. LaSalle St. P'ship*,
526 U.S. 434 (1999) 18, 27

Begier v. *IRS*,
496 U.S. 53 (1990) 6

Bevill, Bresler & Schulman Asset Mgmt. Corp. v. *Spencer Sav. & Loan Ass'n*,
878 F.2d 742 (3d Cir. 1989) 22

BFP v. *Resolution Tr. Corp.*,
511 U.S. 531 (1994) 6

Bonded Fin. Servs., Inc. v. *European Am. Bank*,
838 F.2d 890 (7th Cir. 1988) 10

FDA v. *Brown & Williamson Tobacco Corp.*,
529 U.S. 120 (2000) 17

Hall v. *United States*,
132 S. Ct. 1882 (2012) 5, 13, 17

Hartford Underwriters Ins. Co. v. *Union Planters Bank, N.A.*,
530 U.S. 1 (2000) 18

Law v. *Siegel*,
134 S. Ct. 1188 (2014) 29

In re Lyondell Chem. Co.,
503 B.R. 348 (Bankr. S.D.N.Y. 2014) 26

TABLE OF AUTHORITIES—Continued

Page(s)

Matter of Coutee,
984 F.2d 138 (5th Cir. 1993) 10

New York State Dept. of Social Servs. v. *Dublino*,
413 U.S. 405 (1973).....18

Picard v. *Fairfield Greenwich Ltd.*,
762 F.3d 199 (2d Cir. 2014) 6

RadLAX Gateway Hotel, LLC v. *Amalgamated Bank*,
132 S. Ct. 2065 (2012).....5, 29

Robinson v. *Shell Oil Co.*,
519 U.S. 337 (1997).....17

Seligson v. *N.Y. Produce Exch.*,
394 F. Supp. 125 (S.D.N.Y. 1975) 19, 20, 32

In re Tribune Co. Fraudulent Conveyance Litig.,
818 F.3d 98 (2d Cir. 2016).....2

Utility Air Regulatory Grp. v. *EPA*,
134 S. Ct. 2427 (2014).....17

Whitman v. *Am. Trucking Ass'ns*,
531 U.S. 457 (2001).....18

Wieboldt Stores, Inc. v. *Schottenstein*,
131 B.R. 655 (N.D. Ill. 1991) 22, 26

Zahn v. *Yucaipa Capital Fund*,
218 B.R. 656 (D.R.I. 1998).....25, 27

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes

11 U.S.C. § 101(54) 7
11 U.S.C. § 544 ..... 6, 7, 17
11 U.S.C. § 545 ..... 6, 7, 17
11 U.S.C. § 546(d) 22
11 U.S.C. § 546(e) ..... *passim*
11 U.S.C. § 546(f) 23
11 U.S.C. § 546(g) 23
11 U.S.C. § 546(i) 23
11 U.S.C. § 547 ..... 6, 7, 17
11 U.S.C. § 547(a)(4)(B) 14
11 U.S.C. § 547(b) 7, 17, 24
11 U.S.C. § 547(b)(4)(B) 13
11 U.S.C. § 548 ..... 6, 7
11 U.S.C. § 548(a) 24
11 U.S.C. § 548(a)(1)(A) 6, 7
11 U.S.C. § 548(a)(1)(B) 6, 17
11 U.S.C. § 548(b) 17
11 U.S.C. § 550(a) 8, 9
11 U.S.C. § 550(b) 14

TABLE OF AUTHORITIES—Continued

Page(s)

11 U.S.C. § 764(c) 20, 21, 22

Pub. L. No. 95-598, 92 Stat. 2549 (1978).....20

Pub. L. No. 97-222, 96 Stat. 235 (1982).....22

Pub. L. No. 98-353, 98 Stat. 333 (1984).....22

Pub. L. No. 109-8, 119 Stat. 23 (2005).....23, 24

Pub. L. No. 109-390, 120 Stat. 2692 (2006).....23

13 Eliz. (1570).....6

Legislative History

H.R. 31 and H.R. 32, Bankruptcy Act Revision: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 94th Cong., 2d Sess. (1976) 19, 20

H.R. Rep. No. 95-595 (1977) 20

H.R. Rep. No. 96-1195 (1980) 21

H.R. Rep. No. 97-420 (1982) 21, 22

H.R. Rep. No. 109-31(I) (2005).....23

H.R. Rep. No. 109-648 (2006).....24, 30

S. Rep. No. 95-989 (1978).....21

S. Rep. No. 98-65 (1983).....23

TABLE OF AUTHORITIES—Continued

Page(s)

Other Authorities

5-546 Collier on Bankruptcy ¶ 546.LH[5] (16th ed. 2017) 21

Ralph Brubaker, *Understanding the Scope of the §546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought to Be Avoided*, 37 No. 7 Bankr. L. Letter NL 1, July 2017.....11, 24

Irving E. Walker & G. David Dean, *Structuring a Sale of Privately-Held Stock to Reduce Fraudulent-Transfer Claims Risk*, 28 Am. Bankr. Inst. J. 16 (2009).....27

BRIEF OF TRIBUNE COMPANY RETIREES AND NOTEHOLDERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*[1]

Amici are former unsecured creditors of Tribune Company, which filed a bankruptcy petition less than a year after a disastrous leveraged buyout siphoned more than $8.2 billion from the company to its shareholders in exchange for their Tribune shares. *Amici* include both retired Tribune employees who hold claims for unpaid retirement benefits, as well as noteholders of Tribune's pre-LBO notes and subordinated debentures, each of whom received a fraction (or in some cases none) of what they were owed when Tribune exited bankruptcy in 2012. *Amici* brought state-law constructive fraudulent transfer claims against Tribune's former shareholders seeking to avoid payouts made as part of the LBO. Those claims are the subject of a petition for certiorari that is pending before this Court. See *Deutsche Bank Trust Company Americas* v. *Robert R. McCormick Foundation*, No. 16-317 (Sept. 9, 2016).[2]

---

[1] The parties have given blanket consent to the filing of *amicus curiae* briefs in support of either party. No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

[2] The noteholder *amici* are Deutsche Bank Trust Company Americas, Delaware Trust Company, and Wilmington Trust

In *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016), the Second Circuit held that 11 U.S.C. § 546(e)—the provision at issue in this case—barred *amici*'s constructive fraudulent conveyance claims. Specifically, the Second Circuit held that Section 546(e) protects from avoidance by a bankruptcy trustee any fraudulent transfer that involves a financial institution; that the presumption against federal preemption of state law does not apply in the bankruptcy context; and that Section 546(e) sweeps more broadly than its text to preempt fraudulent-transfer actions brought by private parties (as opposed to just the "trustee" expressly mentioned in the provision).

Amici's petition for certiorari challenged each of those holdings, and this case addresses one of the questions raised in that petition: whether Section 546(e), which protects from avoidance by the trustee certain transfers "made by or to (or for the benefit of)" financial institutions and other covered entities, applies where the financial institution served only as a conduit for a transfer between the debtor and the ultimate transferee (neither of which is a covered entity). The outcome of this case could therefore materially affect *amici*.

Company. The 186 retiree *amici* are listed in the appendix to the petition for certiorari in No. 16-317.

SUMMARY OF ARGUMENT

I. Section 546(e) is an exception to provisions of the Code designed to allow avoidance of fraudulent conveyances. It provides that the trustee cannot, using a theory of constructive fraudulent conveyance, avoid a "transfer" that is a settlement payment "made by or to (or for the benefit of)" a financial institution or other covered entity. "Transfer" is an express reference to the transfers otherwise avoidable by the trustee under the Code. The relevant transfer, for purposes of Section 546(e), is therefore the *transfer that the trustee seeks to avoid*. Thus, if either the debtor or the entity from which trustee seeks to recover (*i.e.*, the ultimate transferee) is a financial institution, then the exception applies. If, however, neither the debtor nor the entity targeted by the trustee's avoidance action is a financial institution, then the exception does not apply—irrespective of whether the transfer happened to pass *through* a financial institution en route to the transferee.

Petitioner, however, would read Section 546(e) to protect transfers in which a financial institution is simply "involved," even as a mere conduit. But as the Seventh Circuit explained, nearly every non-cash financial transaction *involves* a financial institution or other covered entity in some capacity—a fact that Petitioner does not dispute. Under Petitioner's theory, then, a trustee could not avoid any fraudulent transfer (other than those made with fraudulent intent) involving stocks, bonds, commodities, electronic bank transfers, or even paper checks—a sweeping interpretation of the exception's scope. Section 546(e), however, is a

narrow *exception* to the avoidance powers expressly conferred on the trustee by multiple provisions of the Bankruptcy Code. Petitioner's rule would eviscerate the trustee's avoidance powers with respect to a wide swath of fraudulent transfers.

II. Section 546(e)'s legislative history confirms that the exception applies only where the debtor or the transferee targeted by the trustee is a covered entity. When Congress included the initial version of the exception in the Bankruptcy Code of 1978, it sought to address a specific concern: the risk that the insolvency of one party in the commodities clearance system could spread to other firms, leading to the collapse of the entire market. Congress therefore added the exception to prevent the trustee from avoiding transfers by or to commodity brokers and clearing organizations. In a series of amendments, Congress broadened the types of institutions covered by the exception—adding securities firms, stockbrokers, and the like. But the purpose of the exception remained the same: to protect against the systemic risk to the markets that could result from undoing transfers by or to covered entities.

Those concerns are implicated where a trustee brings an avoidance action *against* a clearing house or other covered entity. But those concerns are not implicated where, as in this case, a transfer between two non-covered entities simply *involves* a financial institution that is neither the debtor nor the ultimate transferee. Petitioner protests that the Seventh Circuit's decision does not protect individual investors from avoidance actions. But Congress enacted section 546(e) to prevent systemic risk to the

market—not to protect investors who have benefited from fraudulent transfers. Petitioner would re-write the narrow exception enacted by Congress—and stretch the exception beyond the breaking point.

ARGUMENT

I. BY ITS TERMS, SECTION 546(e) DOES NOT APPLY WHERE A COVERED ENTITY SERVED ONLY AS A CONDUIT

"The Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is [this Court's] obligation to interpret the Code clearly and predictably using well established principles of statutory construction." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012). Particularly in light of the Code's "complex terrain of interconnected provisions and exceptions enacted over nearly three decades," it is "not for [courts] to rewrite the statute"; rather, courts must interpret the Code according to its "plain language, context, and structure." *Hall* v. *United States*, 132 S. Ct. 1882, 1893 (2012). Here, Section 546(e)'s plain language, context, and structure all make clear that the exception does not apply to transfers in which a financial institution or other covered entity served only as a conduit. Rather, the exception applies only where the debtor or ultimate transferee is a covered entity.

A. Section 546(e) Applies Only Where The Debtor Or The Transferee From Which The Trustee Seeks To Recover Is A Covered Entity

Fraudulent transfers are a widely recognized evil. The Bankruptcy Code and other laws allow them to

be avoided because they take money rightfully belonging to creditors and give it to someone else. "A fraudulent conveyance (or fraudulent transfer) action seeks to recover or avoid transfers that wrongfully reduce the pool of assets available to creditors." *Picard* v. *Fairfield Greenwich Ltd.*, 762 F.3d 199, 208 (2d Cir. 2014). "The modern law of fraudulent transfers had its origin in the" 1570 Statute of Elizabeth, "which invalidated 'covinous and fraudulent' transfers designed 'to delay, hinder or defraud creditors and others.'" *BFP* v. *Resolution Tr. Corp.*, 511 U.S. 531, 540 (1994) (quoting 13 Eliz., ch. 5 (1570)). All 50 states have fraudulent transfer statutes, and "[e]very American bankruptcy law has incorporated a fraudulent transfer provision." *Id.* at 541.

Under the Bankruptcy Code, as under state fraudulent-transfer laws, a transfer may qualify as "fraudulent" either because it was made with "actual intent to hinder, delay, or defraud" a creditor, or because it was made in exchange for less than "reasonably equivalent value" while the transferor was insolvent or otherwise financially distressed (and thus a "constructive" fraud). 11 U.S.C. § 548(a)(1)(A), (B). The Code grants the trustee in bankruptcy expansive powers to unwind such fraudulent transfers. See 11 U.S.C. §§ 544, 545, and 548. It also grants the trustee the power to avoid preferential payments to creditors made in a specified period preceding the petition date. See 11 U.S.C. § 547. When a trustee "avoids" a transfer under those provisions, it returns to the bankruptcy estate "property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings." *Begier* v. *IRS*, 496 U.S. 53, 58 (1990). The trustee's

avoidance powers are therefore among the most powerful tools in the trustee's arsenal—and promote the Code's goal of maximizing creditor recoveries.

Section 546(e) carves out a narrow exception to the trustee's avoidance powers under the Code. Specifically, it provides that, "[n]otwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title," a trustee using a theory of constructive fraudulent conveyance cannot avoid "a transfer" that is a settlement payment "made by or to (or for the benefit of)" a financial institution or other covered entity (where there was no fraudulent intent).[3] Although Section 101(54) defines transfer to include "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with" property or an interest in property, the only transfers that are implicated by Section 546(e) are those that are otherwise avoidable by the trustee under Sections 544, 545, 547, and 548.

A "transfer," of course, requires a transferor (typically the debtor) and a transferee. For example, Section 547(b) provides that the trustee may, in certain circumstances, avoid a "transfer of an interest of the debtor in property" made "to or for the benefit of a creditor." What Section 546(e)'s exception says, then, is that, notwithstanding Section 547(b), the trustee cannot avoid a transfer in which either the debtor (transferor) or creditor (transferee) is a financial institution (or in which a

---

[3] The exception does not apply to transfers made with the intent to defraud. See 11 U.S.C. § 546(e) (excluding from the exception transfers avoidable under Section 548(a)(1)(A)).

transfer between non-financial institutions is made for the benefit of a financial institution).

But Section 546(e) does not protect transfers that simply pass *from* a debtor, *through* a financial institution, and *to* a creditor (the ultimate transferee). That is because the Code defines a "transfer," within the meaning of the exception, as a transfer that would otherwise be *avoidable by the trustee* under the avoidance provisions enumerated in Section 546(e). As the Seventh Circuit explained (at Pet. App. 12-13), the trustee can avoid a transfer only to a "transferee," 11 U.S.C. § 550(a), and a party does not qualify as a transferee unless it has gained a beneficial interest in that property—an interest that a financial intermediary does not obtain. In other words, an avoidable "transfer" can occur only between two entities with an ownership interest in the property—the debtor, and the ultimate transferee.

Another way to approach the question—and to define the relevant "transfer" for purposes of Section 546(e)—is to ask: *What is the transfer that the trustee seeks to avoid?* Consider, for example, the transfer of stock from Company A to Company B, neither of which is a covered entity. That transfer will, by necessity, pass *through* a financial institution that exchanges the stock for consideration. But, if the trustee brings a claim against Company B (the transferee/creditor) to recoup property on behalf of Company A (the transferor/debtor), the relevant "transfer"—*i.e.*, the transfer that "the trustee may not avoid," 11 U.S.C. § 546(e)—is the transfer *by* Company A *to* Company B, the parties at the ends of the asset-transfer chain. Neither is a financial

institution, so by its text Section 546(e)'s exception does not apply (even though the transfer happened to go through a financial institution).

Now imagine that Company A exchanges the same stock with Company C, a bank. If the trustee seeks to avoid that transfer, it would do so by bringing an action against *the bank*—the transferee to which the relevant "transfer" was ultimately made, and from which the trustee seeks to recover. And in that scenario, the exception *will* kick in. That is not because a financial institution served as an intermediary (as financial institutions do in nearly all financial transactions), but rather because a financial institution was the *transferee from which the trustee sought recovery*. See 11 U.S.C. § 546(e) ("the trustee may not avoid a transfer . . . made by or to (or for the benefit of) a . . . financial institution").[4]

Petitioner's argument (at 37) that "[d]etermining the precise contours of the conduit principle could

---

[4] *Amici* Former Tribune and Lyondell Shareholders argue (at 18) that Section 550(a) should not bear on the scope of the exception in Section 546(e) because the former concerns only "transferees" of fraudulently conveyed property, while the latter "does not require that the Qualifying Entity be a 'transferee'" at all. But Section 546(e) concerns the trustee's attempt to "avoid a transfer," and there can be no "transfer" without both a "transferor" and a "transferee." In any event, because all Section 546(e) says is that "the trustee may not avoid a transfer" that meets the conditions then spelled out, the simplest and most textually supportable approach is to ask what transfer the trustee is seeking to avoid. If the trustee is neither seeking to take money from nor seeking to give money to a covered entity through the avoidance action, then Section 546(e)'s text has nothing to say about the matter.

require years of litigation" is therefore without merit. The analysis is simple: Is either the debtor or the entity from which the trustee seeks to recover a covered entity? If so, the exception applies; if not, it doesn't.[5]

B. Petitioner Misinterprets Section 546(e) And Would Vastly Expand The Exception's Narrow Exclusion From The Trustee's Avoidance Powers

Petitioner's primary textual argument to the contrary rests on the fact that Congress added the phrase "(or for the benefit of)" to Section 546(e) in 2006. According to Petitioner, that parenthetical would be unnecessary if the terms "by" or "to" required the covered entity to have a beneficial interest in the transferred property. Pet. Br. 16-20.

Petitioner's argument misses the point. The key question under Section 546(e) is whether a transaction is a "*transfer*" that is otherwise avoidable by the trustee. And as noted, such a "transfer" must

---

[5] In any event, there is no merit to Petitioner's suggestion that courts will be unable to define the contours of the conduit principle. There is already abundant case law on the "dominion or control" test used by numerous courts of appeals to determine whether a party qualifies as a transferee. *Matter of Coutee*, 984 F.2d 138, 140 (5th Cir. 1993) (per curiam) (collecting cases); see *Bonded Fin. Servs., Inc.* v. *European Am. Bank*, 838 F.2d 890, 893 (7th Cir. 1988); see also Resp. Br. 36-39. Applying that authority makes clear that there is no merit to the suggestion by the *amici* Former Tribune and Lyondell Shareholders (at 9 n.3) that an intermediary in a financial transaction somehow has a beneficial interest in funds that simply passed through it.

be by a transferor (the debtor), and to a transferee (the entity from which the trustee seeks to recover). A financial institution that serves as a conduit is neither.

As discussed below, Congress added the "(or for the benefit of)" parenthetical to Section 546(e) in "technical changes" that it made to the provision in 2006. See *infra*, at 23, 24, 30. But that change was just a recognition that, in some cases, a transfer may be for the ultimate benefit of a financial institution, even if it is made to a non-covered entity. Suppose, for example, that Company C, a bank, guarantees Company A's loan to Company B, and Company B pays off the loan. In that situation, Company B's payment is "to" Company A and "for the benefit of" Company C (a covered entity)—and thus protected by the exception. The addition of "(or for the benefit of)" did not alter the meaning of "transfer" under Section 546(e). See also Ralph Brubaker, *Understanding the Scope of the §546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought to Be Avoided*, 37 No. 7 Bankr. L. Letter NL 1, July 2017, at 14 (describing other instances in which the "or for the benefit of" language would operate, and discussing parallel references in related provisions of the Bankruptcy Code).

Petitioner, however, begs the question of what constitutes a "transfer" within the meaning of Section 546(e). For example, Petitioner states that it is "undisputed" that the financial intermediaries here "made and received the *transfers* at issue."

Pet. Br. 15 (emphasis added).[6] But that's not undisputed. That's the central issue in this case: What constitutes a "transfer" that falls within the scope of Section 546(e)'s exception? The only thing undisputed is that the transfers that the trustee sought to avoid here were made *through* financial institutions. Petitioner simply assumes that *any* type of financial transaction qualifies as a "transfer" that "the trustee may not avoid."[7]

Indeed, Petitioner states that Section 546(e) protects "securities and commodities *transactions*." Pet. Br. 11 (emphasis added). Petitioner also states that Section 546(e) protects transactions "*involving* certain types of institutions against claims by bankruptcy trustees"—and repeatedly frames the relevant question as whether financial institutions are *involved*. *Ibid.* (emphasis added); see *id.* at 3, 15, 24, 30, 37, 38, 45, 46.

But Section 546(e) says nothing about "transactions"—it uses the term "transfers," an express

---

[6] Here, one of the financial institutions (Citizens Bank) served as escrow agent for the stock and land sales, and the other (Credit Suisse) loaned money to Valley View to purchase shares of Bedford Downs' stock.

[7] *Amici* Former Tribune and Lyondell Shareholders are likewise wrong when they assert (at 16) that Tribune and Lyondell "each made just one or two wire transfers to CTC and Citibank, respectively." The only "transfers" were those from the debtors (Tribune and Lyondell) to the ultimate transferees (the shareholders). There was no "transfer" between the debtors in those cases and CTC and Citibank, which served only as intermediaries in the transfer between the debtors and the transferees.

reference to the fraudulent transfers that are otherwise avoidable by the trustee under other provisions of the Code. Nor does Section 546(e) apply whenever financial institutions are simply "involved," somehow, in a transaction. Rather, it applies where the "transfer" that the trustee seeks to avoid is "by," "to," or "for the benefit of" a financial institution—that is, where the financial institution is the transferor or transferee within the meaning of the Code. Petitioner seeks to "rewrite the statute" to serve its purposes. *Hall*, 132 S. Ct. at 1893.

Petitioner's theory assumes that what the trustee seeks to avoid is not a single transfer between the debtor and ultimate transferee, but rather a *series of transfers—i.e.*, a transfer from the debtor *to* an intermediary financial institution; a transfer *from* that financial institution *to* another intermediary financial institution; and finally a transfer *from* that second financial institution *to* the ultimate transferee. See Pet. Br. 19-20 (stating that Credit Suisse "transferred the funds *to* Citizens," and that Citizens then transferred those funds "to Petitioner").

But if Petitioner were correct that the statute does not focus on the single transfer between the debtor and ultimate transferee, but rather on what it describes as a series of smaller transfers through intermediaries, then numerous provisions of the Code would be all but illusory. Section 547(b)(4)(B), for example, provides that the trustee can avoid a broader range of preferential transfers if the creditor at the time of the transfer was an "insider." Under Petitioner's hyper-granular interpretation of "transfer," however, there would be no such thing as

a transfer from a debtor to an insider (the focus of Section 547(a)(4)(B)). Rather, there would be a transfer from the debtor to an outside financial intermediary, and then from the financial intermediary to the creditor that is an insider/affiliate of the debtor.[8]

Similarly, Section 550(b) allows a subsequent transferee to assert a good-faith defense that is not available to the initial transferee. See Pet. Br. 29. Under Petitioner's view, however, nearly *everyone* would qualify as a subsequent transferee, because the initial transfer would be from the debtor to the financial intermediary; the subsequent transfer would then be from that intermediary to the ultimate beneficiary. In short, when the Code says that "the trustee may not avoid a transfer," it does not contemplate that *every* transaction in the asset-transfer chain between debtor and creditor, including

---

[8] In other words, Petitioner reads Section 546(e)'s reference to transfers "by or to" financial institutions to mean transfers that occur *through* financial institutions. But a transfer through a financial institution is not a transfer "by or to" a financial institution. An analogy illustrates the point. Imagine that a spectator sitting in a middle seat at a baseball game wants to purchase a hot dog from a vendor standing in the aisle. The spectator passes his money to a fan sitting on the aisle seat, and that fan hands the money to the vendor. The vendor then does the same thing with the hot dog, handing it to the fan in the aisle seat, who hands the hot dog to the spectator in the middle seat. If the spectator who purchased the hot dog wants his money back, would he ask the fan in the aisle seat to pay him back? No; he would ask the vendor for his money back. That is because the relevant transfer that he seeks to undo was a transfer to the vendor—even though the transfer happened to pass *through* the fan in the aisle seat.

transactions that simply pass *through* financial intermediaries, is a separate transfer to which the trustee brings a forbidden challenge.

Petitioner's interpretation of the exception, moreover, creates a gaping hole in that exception. In the vast majority of securities transactions, funds will necessarily pass *through* a financial institution en route to shareholders, bondholders, lenders or other ultimate transferees. By deeming that financial pit-stop sufficient to trigger Section 546(e)'s exception, Petitioner's rule would eviscerate the trustee's avoidance power with respect to a broad swath of fraudulent transfers. Petitioner has essentially written the constructive fraudulent transfer provisions out of the Code.

Petitioner effectively concedes as much. As the Seventh Circuit explained, Petitioner's view of Section 546(e) is "so broad as to render any transfer non-avoidable unless it were done in cold hard cash." Pet. App. 11. Even transactions by check or wire transfer (both of which would need to be processed by a financial institution) would fall within the exception. Petitioner's only response is that neither financial institution *in this case* "simply processed a check or a wire transfer on behalf of the buyer or seller," and that this "Court need not locate the outer reaches of the safe harbor to resolve this case." Pet. Br. 44, 45.[9]

---

[9] Petitioner also states that the Seventh Circuit's "concern that financial institutions are involved in some fashion in nearly every securities or commodities transaction, leaving no transfers to be avoided"—which Petitioner does not dispute—"is not a basis to deny coverage to financial institutions and parties

But Petitioner cannot duck the issue. Petitioner assumes that the singular purpose of Section 546(e) (pursued without regard to countervailing considerations) is to protect "large and complex" transactions, which, according to Petitioner, necessarily (and uniquely) *involve* financial institutions. Pet. Br. 11; see also *id.* at 2, 36. As we show below, that is not Section 546(e)'s purpose. But in any event, financial institutions are involved, in some way, in nearly *every* financial transaction—large or small, complex or simple. Even aside from the check-cashing and money-wiring scenarios posited by the Seventh Circuit, nearly every stock transfer between two individuals—be it one share, or a million—requires the involvement of a financial institution or other covered entity (to hold and exchange the stock for consideration).

Under Petitioner's theory, then, a trustee could not avoid *any* transfer (other than transfers made with fraudulent intent) involving stocks, bonds, commodities, electronic bank transfers—or even old-fashioned paper checks. That is an astonishingly broad (and wrong) interpretation of what is supposed to be a narrow *exception* to the trustee's avoidance powers under the Code. Indeed, Petitioner's theory deletes 400 years of fraudulent transfer law from the books (unless the transfer at issue was made with bags of cash).

---

with beneficial interests in transactions." Pet. Br. 14-15. But the Seventh Circuit's interpretation would *not* deny coverage to financial institutions with beneficial interests in a transfer and that are targeted by a trustee's avoidance action—it *includes* such transfers within the scope of the exception.

The same holds true for the impact of Petitioner's theory on the law of preferences. A fundamental precept of the Code is that creditors of equal rank should recover ratably. Where a debtor chooses to repay certain creditors on the eve of bankruptcy, such transfers are presumptively avoidable by the trustee as preferences under 11 U.S.C. § 547(b). Petitioners say that such preferred creditors should get to keep payments made on their debt—even if made only a day before a bankruptcy filing, and even if such creditors are friends, family members, or business relations of the debtor's management—while other creditors receive nothing, so long as (and only because) such creditors happen to be repaid using a financial institution as a mere conduit.

When interpreting a provision of the Code, courts must look to its "plain language, context, and structure." *Hall*, 132 S. Ct at 1893. More broadly, it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted). Thus, "reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Utility Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

Here, Section 546(e)'s exception is a limited exclusion from the expansive avoidance powers expressly conferred on the trustee by Sections 544, 545, 547, 548(a)(1)(B), and 548(b). Those avoidance

powers are among the most powerful tools in the trustee's arsenal—and promote the Code's goal of "maximizing property available to satisfy creditors" in the event of a bankruptcy. *Bank of Am. Nat'l Tr. & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999). Congress would not vitiate the avoidance powers expressly conferred on the trustee by multiple Code provisions by creating an exception so broad that it swallows the rule. Yet that is precisely what Petitioner's reading of Section 546(e) would do.

Congress does not "hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Thus, if Congress had intended to limit the trustee's avoidance powers so dramatically "it could simply have said so." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000). It didn't. This Court should therefore reject Petitioner's attempt to rewrite the exception in a way that would insulate nearly all constructive fraudulent transfers from avoidance by the trustee. See *New York State Dept. of Social Servs.* v. *Dublino*, 413 U.S. 405, 419-20 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").

II. THE LEGISLATIVE HISTORY CONFIRMS THAT SECTION 546(e) DOES NOT PROTECT TRANSFERS CONDUCTED THROUGH FINANCIAL INSTITUTIONS

Section 546(e)'s legislative history confirms what its text makes clear: that the exception does not protect transfers in which a financial institution or other covered entity served as a mere conduit. Congress created the exception to address a specific

(and narrow) concern: the risk that clawing back funds from a party in the clearance and settlement system could lead to an insolvency that would, in turn, spread to other firms and lead to the collapse of the entire market. Those concerns are not implicated where, as here, a fraudulent transfer merely passed *through* a financial institution, as a conduit, en route to a defendant-transferee that is not such an institution at all.

A. Congress Enacted The Exception To Protect Against The Risk That The Bankruptcy Of One Commodities Or Securities Firm Could Spread To Other Firms

What is now Section 546(e) originated in a narrow provision first enacted as part of the Bankruptcy Code of 1978. In 1976, William Bagley, the Chairman of the Commodity Futures Trading Commission (CFTC), wrote to Congress with concerns regarding "the treatment which commodity customers will be accorded by a trustee in bankruptcy." *H.R. 31 and H.R. 32, Bankruptcy Act Revision: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 94th Cong., 2d Sess. ("Bankr. Act Rev."), at 2378 (1976). One such concern involved "the treatment by [a] trustee of margin deposits and payments made to a clearing house" in "the event of the bankruptcy of a futures commission merchant." *Id.* at 2405-06.

Chairman Bagley's concerns were prompted by the decision in *Seligson* v. *N.Y. Produce Exchange*, 394 F. Supp. 125 (S.D.N.Y. 1975). In that case, the trustee of a bankrupt commodities broker brought

suit against a commodities exchange (the New York Produce Exchange) and a commodities clearing house association (the New York Produce Exchange Clearing Association) to recover alleged fraudulent conveyances of margin payments made on oil-seed futures. The court denied the clearing association's motion for summary judgment, making the clearing association itself potentially liable for millions of dollars. *Id.* at 136.

Clearing houses facilitate financial transactions—in the case of commodities futures, for example, by holding margin payments from the parties to ensure that the party on the profitable side of the transaction will receive its profit. Chairman Bagley explained that, by making clearing houses liable for margin payments, the court's decision in *Seligson* "severely threatened" the "financial stability" of clearing houses, which are critical to the function of the commodities futures market. Bankr. Act Rev. at 2406. Chairman Bagley therefore asked Congress to ensure that margin payments made to or with a clearing house or other futures commission merchant "be protected from reversal by the trustee in bankruptcy." *Ibid.*

Congress obliged. Section 764(c) of the newly enacted Code provided that "the trustee may not avoid a transfer that is a margin payment to or deposit with a commodity broker or forward contract merchant or is a settlement payment made by a clearing organization." Pub. L. No. 95-598, § 764(c), 92 Stat. 2549 (1978). The House Report acknowledged that the provision was "derived largely from" Chairman Bagley's letter, H.R. Rep. No. 95-595, at 271-73 (1977), reprinted in 1978 U.S.C.C.A.N.

5963, 6229-31, and the Senate Report stated that the exception "overrules *Seligson*," S. Rep. No. 95-989, at 106 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5794.[10] As the Senate Report also explained, the policy of the provision, which protected margin payments to clearing organizations from avoidance by the trustee, was to "promote customer confidence in commodity markets" and to protect commodity market stability by preventing a "ripple effect that disrupts the entire market." S. Rep. No. 95-989, at 8.

In 1982, Congress revisited the exception to preserve further "the financial integrity of the nation's commodity and securities markets," H.R. Rep. No. 96-1195, at 7 (1980), and to "minimize the displacement caused in the commodities and securities market in the event of a major bankruptcy affecting those industries," H.R. Rep. No. 97-420, at 1 (1982), reprinted in 1982 U.S.C.C.A.N. 583, 583. As the 1982 House Report on the amendments explained:

> The commodities and securities markets operate through a complex system of accounts and guarantees. Because of the structure of the clearing systems in these industries and the sometimes volatile nature [of] the markets, certain protections are necessary to prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market.

---

[10] See also 5-546 Collier on Bankruptcy ¶ 546.LH[5] & nn.36, 37 (16th ed. 2017) (stating that Congress enacted Section 764(c) "[i]n response" to *Seligson*).

H.R. Rep. No. 97-420, at 1 (1982), reprinted in 1982 U.S.C.C.A.N. 583, 583.

The 1978 Act "provide[d] certain protections to the commodities market to protect against such a 'ripple effect'"—namely by precluding a trustee from avoiding margin payments made to a commodity broker. *Ibid.* That Act did not, however, expressly apply to the securities industry. To remedy that omission, the 1982 amendments sought "to clarify and, in some instances, broaden the commodities market protections and expressly extend similar protections to the securities market." *Id.* at 2.[11] Accordingly, Congress replaced Section 764(c) with Section 546(d), and that new subsection provided that "the trustee may not avoid a transfer that is a margin payment, . . . or settlement payment, . . . made by or to a commodity broker, forward contract merchant, stockbroker, or securities clearing agency." Pub. L. No. 97-222, § 4, 96 Stat. 235 (1982).

In 1984, Congress added "financial institution[s]" to the exception and moved it from Section 546(d) to Section 546(e), where it remains today. See Pub. L. No. 98-353, § 351(2), § 461, 98 Stat. 333 (1984). And once again the legislative history made clear that the

---

[11] See *Bevill, Bresler & Schulman Asset Mgmt. Corp.* v. *Spencer Sav. & Loan Ass'n*, 878 F.2d 742, 747 (3d Cir. 1989) (when it enacted the 1982 amendments, "Congress was concerned about the volatile nature of the commodities and securities markets"); *Wieboldt Stores, Inc.* v. *Schottenstein*, 131 B.R. 655, 664 (N.D. Ill. 1991) ("Congress exempted settlement payments in the commodities (and later the securities) industry out of concern that the bankruptcy of one party in the clearance and settlement chain could spread to other parties in that chain.").

principal objective of the exception was "to prevent the insolvency of one commodities or securities firm from spreading to other firms and possibly threatening the stability of the affected market." S. Rep. No. 98-65, at 47 (1983).

Congress added "financial participant[s]" to the list of covered entities in 2005. Pub. L. No. 109-8, § 907(o)(3), 119 Stat. 23 (2005). When Congress made that addition, the 2005 House Report again emphasized that the purpose of the new provisions was to "reduce 'systemic risk' in the banking system and financial marketplace." H.R. Rep. No. 109-31(I), at 20 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 105; see *id.* at 3, 89 (likewise referring to reduction in "systemic risk").

Congress amended Section 546(e) most recently in 2006. Among other things, that legislation added the parenthetical phrase "(or for the benefit of)" after the phrase "by or to." Pub. L. No. 109-390, § 5(b)(1), 120 Stat. 2692 (2006).[12] The legislative history says nothing about why Congress added that parenthetical. The House Report accompanying the amendments, however, stated that the bill makes only "*technical changes* to the netting and financial contract provisions incorporated by Title IX of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, to update the language to reflect current market and regulatory practices, *and help reduce systemic risk in*

---

[12] Congress also added the parenthetical phrase "(or for the benefit of)" after "by or to" in Sections 546(f), (g), and (i). See Pub. L. No. 109-390, § 5(b)(2), (3), and (4), 120 Stat. 2692.

the financial markets by clarifying the treatment of certain financial products in cases of bankruptcy or insolvency." H.R. Rep. No. 109-648, at 1-2 (2006), reprinted in 2006 U.S.C.C.A.N. 1585, 1585-87 (emphasis added).[13]

As Respondent observes (at 52-53), the most likely explanation for Congress's addition of "(or for the benefit of)" is simply that it wanted to make Section 546(e) consistent with the avoidance provisions to which that section is an exception. Both Sections 547(b) and 548(a) permit the avoidance of certain transfers made "for the benefit" of creditors. Without the addition of that same language to Section 546(e), a trustee might have been able to avoid a transfer that was made for the benefit of a financial institution even though it could not have avoided that very same transfer had it been made directly by or to that institution. See Brubaker, *supra*, at 14-15. Closing such a gap is the kind of "technical amendment" Congress thought it was making.

B. The Problem Section 546(e) Addresses Is Not Implicated Where Neither The Debtor Nor The Transferee From Which The Trustee Seeks To Recover Is A Covered Entity

1. Section 546(e)'s legislative history makes clear that Congress enacted the exception to prevent the bankruptcy of one entity in the clearance and

---

[13] Title IX includes the "Bankruptcy Law Amendments," including amendments to Section 546(e). Pub. L. No. 109-8, § 907(e), 119 Stat. 23 (2005).

settlement system from spreading to other entities in that system. "The securities industry," like the commodities industry at issue in *Seligson*, "utilizes a clearance and settlement system, wherein parties use intermediaries to make trades of public stock which are instantaneously credited, but in which the actual exchange of stock and consideration therefor takes place at a later date." *Zahn* v. *Yucaipa Capital Fund*, 218 B.R. 656, 675 (D.R.I. 1998) (internal quotation marks omitted).

That system "depends upon a series of guarantees, made by all parties in the chain, that they will live up to their obligations regardless of a default by another party in the chain." *Id.* at 676. If the "pre-bankruptcy trades by a bankrupt intermediary could be set aside, then the guarantees that allow the system to function would be threatened, the parties could not proceed with confidence, and a bankruptcy by one party in the chain could spread to other parties in the chain, threatening a collapse of the entire industry." *Ibid.*

Those concerns are implicated where, as in the *Seligson* case that prompted Congress to enact the exception, a trustee brings an avoidance action directly *against* a commodities clearing association (or other covered entity) in its proprietary capacity. But those concerns are not implicated where, as here, a transfer between two non-covered entities simply *involves* a financial institution that is neither the debtor nor the ultimate transferee. The trustee in this case does not seek *anything* from the intermediary financial institutions that facilitated the transfer at issue. Rather, the trustee seeks to recover money from a shareholder (a non-covered

entity), and return it to the estate of the debtor (another non-covered entity).

Such avoidance actions directed at "payments to stockholders at the very end of the asset transfer chain, where the stockholders are the ultimate beneficiaries of the constructively fraudulent transfers, and can give the money back to injured creditors with no damage to anyone but themselves," do not implicate the "systemic risk" that concerned Congress. *In re Lyondell Chem. Co.*, 503 B.R. 348, 372-73 (Bankr. S.D.N.Y. 2014). That is because "[t]he inviolability of payments to shareholders is simply not basic to the operation of the clearance and settlement systems" that Section 546(e) seeks to protect. *Wieboldt Stores, Inc.* v. *Schottenstein*, 131 B.R. 655, 664 n.11 (N.D. Ill. 1991) (internal quotation marks omitted).[14]

Petitioner, however, would protect from avoidance nearly any constructive fraudulent transfer that simply passes through a financial intermediary en route to the ultimate transferee. As noted, that means that nearly *every* securities transaction would fall within Section 546(e)'s scope, since nearly every transaction *involves* a covered entity in some capacity. Petitioner's theory therefore amounts to an assertion that Congress intended to give those who benefit from fraudulent transfers a free pass.

---

[14] If the avoidance of transfers that merely *involved* financial entities implicated the systemic risk that motivated Congress to enact Section 546(e), one would have expected the United States to have filed a brief in support of Petitioner. It did not do so.

And the few (if any) financial transactions that don't fall within the sweep of the exception under Petitioner's theory can readily be brought within Section 546(e)'s reach by someone seeking to make a fraudulent transfer without potential liability.[15] Indeed, Petitioner's interpretation, if accepted, "would serve to sanction the practice of structuring private stock purchases in an effort to circumvent the avoidance section, merely by utilizing a financial institution" in some way. *Zahn*, 218 B.R. at 677 (internal quotation marks omitted); see also Irving E. Walker & G. David Dean, *Structuring a Sale of Privately-Held Stock to Reduce Fraudulent-Transfer Claims Risk*, 28 Am. Bankr. Inst. J. 16, 72 (2009) (advising practitioners to use "a financial institution, instead of a law firm," as escrow agent so that "an otherwise fraudulent transfer of funds . . . may be exempted from avoidance").

This Court has recognized that "maximizing property available to satisfy creditors" is a core purpose of the Code's avoidance provisions. *Bank of Am. Nat'l Tr.*, 526 U.S. at 453. Petitioner, however, would expand Section 546(e)'s narrow exception to the trustee's avoidance powers so that it swallows the rule—hindering the trustee's ability to avoid nearly all constructive fraudulent transfers. That reading not only conflicts with the text, context, and

---

[15] Even fraudulent cash transfers could be protected by Petitioner's reading of the exception if such transfers go through an escrow agent that is a covered entity. See Br. of Former Tribune and Lyondell Shareholders Amici at 11 (stating that a deposit of funds with an escrow agent in a home sale is a transfer "to" that agent).

history of Section 546(e) itself—which make clear that Section 546(e) does not go nearly that far—but also undermines Congress's goal of maximizing and equalizing recovery to creditors.

Indeed, Petitioner essentially acknowledges as much, asserting that the Seventh Circuit's interpretation "would not protect smaller market players, including individual investors, their retirement plans, investment clubs, and employee stock ownership trusts." Pet. Br. 35. *Amici* Former Tribune and Lyondell Shareholders go so far as to state (at 10) that, "even if a bankruptcy trustee could avoid a transfer only as to the ultimate owner, without disrupting any other part of the transaction, that alone would create uncertainty and risk in the capital markets and thus raise the cost of capital."

But Congress did not enact Section 546(e) to protect *investors*—much less investors enriched through fraudulent transfers. Rather, Congress sought to protect *financial institutions* themselves—specifically, by reducing the risk that the bankruptcy of one financial institution spreads to another financial institution. The whole purpose of the avoidance powers that the Code confers on the trustee is to *prevent* investors from benefiting from fraudulent transfers at the expense of creditors. Yet Petitioner and its *amici* seek a rule that would inoculate individual investors (and indeed, all investors) from virtually all constructive fraudulent conveyance actions.[16]

---

[16] Petitioner's argument that the exception should protect small, individual investors is also at odds with its assertion that

As noted, the Bankruptcy Code promotes multiple, sometimes competing, purposes, *RadLAX*, 132 S. Ct. at 2073, and "it is not for courts to alter the balance struck by the statute," *Law* v. *Siegel*, 134 S. Ct. 1188, 1198 (2014). Thus, a court's task in interpreting the Code is to determine *how far* a provision goes in the service of the multiple policies served by the Code. Here, however, Petitioner not only gets Section 546(e)'s purpose wrong (by asserting that the exception is meant to protect all investors); it then elevates that perceived policy at the near-total expense of the Code's express goal of returning fraudulent transfers to their rightful owner and maximizing recovery to creditors.

2. Petitioner does not seriously dispute that Congress enacted Section 546(e) to protect against systemic risk in the securities and commodities industries. Instead, it suggests that Congress's intent when first enacting the exception is simply no longer relevant in light of the fact that the provision has been amended several times. See Pet. Br. 40-41.

Congress sought to protect transfers involving financial institutions because the "involvement of financial institutions, stockbrokers, securities clearing agencies, and the like is an indication that a securities or commodities transaction is *sufficiently large and complex*" as to warrant protection from avoidance. Pet. Br. 11 (emphasis added). As noted, the purpose of the exception is not to protect "large and complex" transactions. But in any event, as Petitioner effectively concedes, the involvement of financial institutions in a securities or commodities transaction is *not* an indication that the transaction is large and complex; it is just an indication that there *was a securities or commodities transaction* at all.

But as shown above, *every time* that Congress amended the provision, it reiterated that the purpose of the exception remained the same: to prevent against the systemic risk that could result if the insolvency of one securities or commodity firm spread to others. Congress expanded the *types* of institutions that are covered by Section 546(e), to reflect current market realities better, but it never departed from the provision's core purpose of protecting from avoidance a narrow subset of transfers that, if avoided, could threaten the stability of the commodities and securities industries.[17]

When Congress added the "(or for the benefit of)" parenthetical in 2006, moreover, it did so as part of amendments that it characterized as mere "technical changes." H.R. Rep. No. 109-648, at 1-2 (2006), reprinted in 2006 U.S.C.C.A.N. 1585, 1585-87. And, as noted above, that addition simply clarified a minor point—namely that a transfer can fall within the scope of the exception if it is made for the benefit of a covered entity, even if not made directly to that covered entity. If Congress had meant that minor change to effect a sweeping change to the scope of Section 546(e), the legislative history would say something quite different.

Petitioner next suggests that the Seventh Circuit's decision "creates uncertainty" by requiring

---

[17] Petitioner protests (at 42) that "Congress regularly enacts statutes that are broader in scope than the heart of the problem the legislature seeks to address." But as noted, Petitioner's reading of the exception wouldn't merely be "broader" than necessary—it would effectively render illusory the avoidance powers conferred on the trustee by multiple Code provisions.

a case-by-case analysis of whether unwinding a specific fraudulent transfer would "create a 'ripple effect through the financial markets.'" Pet. Br. 38 (quoting Pet. App. 15). According to Petitioner, the "Seventh Circuit did not identify the degree of 'ripple effect' that would be sufficient to justify protecting a transaction"—leaving courts without any guiding principle. *Ibid.*

Petitioner attempts to sow confusion where none exists. The Seventh Circuit did *not*, as Petitioner suggests, call for a case-by-case judicial examination of the systemic risk posed by a particular transaction. Rather, the Seventh Circuit simply addressed the problem that Congress enacted the exception to remedy, and explained why Congress's expressed concern about systemic risk helps justify construing the statute to protect only those transfers in which financial institutions are at the ends of the asset-transfer chain, and not mere conduits: In light of Congress's purpose for enacting Section 546(e), the court explained, "[w]e will not interpret the safe harbor so expansively that it covers any transaction involving securities that uses a financial institution or other named entity as a conduit for funds." Pet. App. 16; see *id.* at 14 ("The safe harbor has ample work to do when an entity involved in the commodities trade is a debtor or actual recipient of a transfer, rather than simply a conduit for funds.").

Finally, Petitioner contends that the "non-conduit requirement would render the inclusion of securities clearing agencies in the safe harbor meaningless." Pet. Br. 25. *Amici* Former Tribune and Lyondell Shareholders likewise suggest (at 20-21) that, under

the non-conduit theory, the transfers at issue in *Seligson* would not be protected by the exception.

Of course they would. As noted, Congress enacted the exception in 1982 to prevent the outcome in *Seligson*, in which the court allowed to go forward a trustee's suit *against a commodities clearing house* itself. 394 F. Supp. at 136. That action—and Petitioner's hypothetical scenario involving a trustee's avoidance action against a securities clearing house—would fall squarely within Section 546(e)'s scope. That is because the trustee's avoidance actions in those scenarios would seek to recover property *directly from the covered entity*. As explained above, that is exactly what Section 546(e) prohibits.

Thus, when Petitioner says (at 26) that, under the non-conduit theory, the statute "would provide no protection to the clearing agency or to the ultimate recipients of funds handled by the clearing agency," Petitioner is half right. The statute *would* provide protection *to the clearing agency* if the trustee sought to recover funds directly from the clearing agency. But the statute would *not* protect the ultimate recipient of the funds that were once simply "handled" by the clearing agency—unless, of course, that ultimate recipient at the end of the asset-transfer chain is itself a financial institution or covered entity.

The text, context, structure, and history of Section 546(e) all compel the same conclusion: The exception applies only where the debtor or the transferee from which the trustee seeks to recover is a covered entity. Petitioner's interpretation—which would protect from avoidance virtually all non-cash

fraudulent transfers, would stretch Section 546(e)'s narrow exception past the breaking point.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JAY TEITELBAUM
TEITELBAUM LAW GROUP, LLC
1 Barker Avenue
White Plains, NY 10601
(914) 437-7670
jteitelbaum@tblawllp.com
Counsel for the Retirees

LAWRENCE S. ROBBINS
Counsel of Record
ROY T. ENGLERT, JR.
ARIEL N. LAVINBUK
DANIEL N. LERMAN
SHAI D. BRONSHTEIN
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
lrobbins@robbinsrussell.com
Counsel for the Noteholders

September 2017